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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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OCT 16 1998

In the Matter of )  
 ) CC Docket No. 98-147  
Deployment of Wireline Services Offering )  
Advanced Telecommunications Capability )

**REPLY COMMENTS OF THE  
DSL ACCESS TELECOMMUNICATIONS ALLIANCE ("DATA")**

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**EXECUTIVE SUMMARY/INTRODUCTION**

In its Advanced Services NPRM, the Commission recognizes that competition is the key to the command in §706 of the Act to promote the rapid investment in and deployment of high-speed, interactive data, voice and video services throughout America. While the Commission's approach to this goal in its NPRM is extraordinarily insightful, the parties have often responded with overly-complicated discussions of the technical, economic and business details associated with advanced services deployment. In many cases, commenters have argued for complex, often case-by-case, regulatory solutions. There is a better approach, however, and one that is more consistent with the Commission's essential insights.

The emergence of competition in advanced services boils down to competition in xDSL services, as these loop-based technologies are the only viable ones for the broad-scale deployment of advanced services in the near-term,<sup>1</sup> and xDSL competitors require only access to both ends of a simple copper loop.

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<sup>1</sup> Initial Comments of Digital Access Telecommunications Alliance ("DATA"), *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Docket 98-146, FCC 98-187 (rel. Aug. 7, 1998)("NOI").

Unfortunately for competition, the ILECs have monopoly control over that essential facility, including the ability to deny competitors access to any particular loop.<sup>2</sup> On loops made available to competitors, one end is located at the user's premises, so the competitors can get access to that end. The other end is at a location controlled by the ILEC,<sup>3</sup> giving the ILEC a second opportunity to deny the loop to a competitor, namely by denying the competitor the right to collocate where the end of the loop is located. Thus, copper loops and collocation are the two elements needed for competition.

ILECs have monopoly control over both of these essential inputs and therefore also have the incentive and opportunity to deny their competitors access to them. As the opening comments of several parties conclusively demonstrated, the ILECs have consistently acted on these anticompetitive incentives and opportunities to deny their DSL competitors access to copper loops and collocation, in a variety of ways.

The opening comments also documented the remarkable creativity of the ILECs in denying or delaying competition through a rich variety of stratagems. But all of these anticompetitive stratagems fall into one of three categories, as the ILECs exercise their monopoly power by manipulating (1) availability, (2) provisioning interval, and (3) price of these bottleneck facilities.

Thus the solution to promoting the §706 goals through enabling competition is neither novel nor complex. The solution is simple. Every individual issue that arises on the road to competition must be measured against these same three criteria: How does this issue affect availability, interval to provision and price of what competitors are entitled to under the Act and need in order to compete. Where the answer is that the ILEC's behavior limits availability,

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<sup>2</sup> See *infra* Section II.

<sup>3</sup> See *infra* Section II.

increases provisioning intervals or increases prices for essential facilities, the Commission must understand the incumbent's actions to be anticompetitive and presume them to be strategic. The Commission must then require the ILEC to justify its conduct or terminate that anticompetitive behavior.

ILECs often respond to CLEC requests for loops or collocation by claiming that no appropriate loops are available, and by claiming that collocation space is also unavailable. ILECs also discriminate against competitors by setting unreasonably long intervals for the provisioning of critical inputs, and then often fail to even meet those guidelines. Finally, incumbents deny access by charging prices for wholesale UNE inputs that bear no reasonable economic or competitive relation with either the actual cost of the input, or the retail rates charged by the ILECs for DSL-based services that employ the same network elements. For new entrants attempting to prove service concepts, raise capital, and get to the market quickly, these delays are particularly harmful.

This is not news. Incumbent telephone monopolists have taken the same anticompetitive approach and applied the same anticompetitive techniques for years. The Bell System systematically denied fair and nondiscriminatory access to its bottleneck local exchange facilities by emerging competitors in long distance, equipment and other allied telecommunications markets. Indeed, AT&T's anticompetitive exploitation of its bottleneck monopoly control of local facilities was the critical factor underlying the MFJ divestiture.

The Commission must craft national rules that prevent the ILEC's from leveraging their market power in bottleneck copper loop and collocation facilities to restrict competition in evolving markets for advanced services, including high-speed broadband advanced services.<sup>4</sup> Because xDSL-based CLECs often cannot gain access to loops or collocation at all, because their

access to loops or collocation is often unreasonably delayed, and because their access is often conditioned on wholesale prices that are either unreasonable or incompatible with the retail prices charged by the incumbent for the same services, the Commission's rules must force the ILECs to provide essential facilities to competitors on fair and nondiscriminatory terms, including availability, interval, and price.

Only through straight-forward and effective national rules can ILEC anticompetitive abuse be nipped in the bud. The Commission adopted such an approach with its Part 68 equipment rules designed to promote and protect then-emerging competition in the customer premise equipment market from the Bell System's anticompetitive denial of interconnection and access to the network. Those standards set forth clear technical requirements ensuring safe interconnection and thus ended years of anticompetitive equipment tariffs and policies on the part of AT&T, resulting in an easy-to-use system that has spawned vigorous competition in the equipment industry.

In developing a set of national rules, the Commission must remember that further delay only weakens the emerging position of new entrants. Many new competitors are ready today to enter advanced service markets, but are unable to enter either at all or at scale because of the unavailability, provisioning interval and price of local loop and collocation space. In setting national standards, the Commission should consider using a "best of breed" approach, at least as an interim solution. The Commission can look across the range of ILEC practices on availability, provisioning intervals, and price to set the best practices in each category as an interim benchmark of reasonableness. The Commission can improve competition significantly even in the short-term by setting such "best" practices as a national minimum benchmark.

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<sup>4</sup> See DATA Reply Comments in NOI (filed October 8, 1998) at 2-12.

The Commission must be careful, however, to distinguish between a "best" practice and a good—or even reasonable—practice. Because there is, by definition, no competitive market for the provision of monopoly bottleneck elements, a "best" practice is only the best that a state regulatory commission has been able to extract from an ILEC.<sup>5</sup>

In addition, in many cases, there will be no "best of breed" performance that even approximates the availability, intervals and rates that would be available in a truly competitive marketplace. Thus, even after selecting a "best of breed" practice in each category, the Commission must subject that practice to a "sanity check" by comparing it to an analogous service that is currently being provided under the pressures of real competition, and force the incumbents to demonstrate why they cannot do the same. If no benchmark is available, the Commission must be vigilant to ensure that ILEC practices are even remotely rational.<sup>6</sup>

Overlaying this framework of specific nationwide rules drafted explicitly to provide competitors access to unbundled clean copper loops and affordable and timely physical collocation, the Commission should unconditionally mandate its proposed separate affiliate rule as a pre-condition to the provision of advanced services by incumbent LECs. Only by requiring incumbents to treat their separate advanced services affiliates exactly like the incumbents treat other competitors, can the Commission expect to see systematic improvement in access to the network.

The simple reason of course—and the genius of the Commission's separate subsidiary proposal—is that no ILEC serious about the DSL business would be willing to function under

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<sup>5</sup> An ILEC's willingness to provide enabling facilities to its dependant competitors is limited to the minimum the ILEC has been clearly ordered to provide in a final and unappealable order of a regulatory commission. Further, the ILECs often say, and nearly always act as though, they have no business discretion to do more or better.

<sup>6</sup> For instance 120-180 days is clearly an excessive interval for the build-out of collocation facilities, regardless of whether or not it is the "best" interval currently being provided by the incumbents.



the constraints the ILECs currently impose on the CLECs. The ILECs effectively concede this point in their vehement arguments that their DSL business cannot be viable as a separate subsidiary.<sup>7</sup>

In combination, national rules on collocation and access to loops, and the mandatory imposition of the Commission's separate affiliate proposal, can weaken the incumbent's grip over the local loop sufficiently to allow competition to flourish.

## DISCUSSION

### **I. THE ILECS IMPEDE xDSL-BASED COMPETITION BY LEVERAGING THEIR MONOPOLY TO DENY LOOP AVAILABILITY, TO SET UNACCEPTABLE PROVISIONING INTERVALS, AND TO PRICE UNREASONABLY**

Several of the incumbent LECs raised technical issues surrounding the quantity and quality of the copper loops which xDSL providers seek in order to provide advanced telecommunications systems. These ostensibly technical objections are simply a smokescreen to obstruct competition by introducing elements of delay and coercion in three areas: (1) the *availability* of clean copper loops; (2) the *time interval* between a CLEC's order of a clean loop and its effective delivery, and (3) the *price* of these unencumbered loops.

#### **A. The ILECs Base Their Denial of the Availability of Unencumbered Copper Loops on Spurious Allegations of Insufficient Supply and Spectrum Interference**

##### **1. Incumbents claim loop shortages so as to deny loop access**

About two months ago, the Commission issued its *Advanced Services Order* which denied Bell Atlantic and SBC's motions for "forbearance" from regulation of their xDSL

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<sup>7</sup> Bell Atlantic Comments at 27-32; GTE Comments at 25-55; US West Comments at 15-34; SBC Comments at 2-13.

services pursuant to Section 706 of the 1996 Act.<sup>8</sup> In that proceeding, the Commission concluded that “if we are to promote the deployment of advanced telecommunications capability to all Americans, competitive LECs must be able to obtain access to incumbent LEC xDSL-capable loops on an unbundled nondiscriminatory basis.”<sup>9</sup> Perhaps in a spirit of optimism, the Commission ordered incumbents to take “affirmative steps” to ensure that CLECs have access to clean copper loops.<sup>10</sup> While this decision is now being challenged by the ILECs, it does serve to highlight the Commission’s correct understanding that the incumbents have readily available clean copper loops in large quantities, and that the presumption should be in favor of CLEC requests to unbundle and provide these loops.<sup>11</sup>

The incumbents emit a squid-like cloud of inky semantic confusion in pretending that clean copper loops are somehow of "superior" quality to loops with load coils and bridged taps. The ILECs argue that the Eighth Circuit’s decision<sup>12</sup> prohibits the Commission from mandating that incumbents provide “superior” quality loops to their competition, and that the loops in turn are to be deemed “superior” because they must be “conditioned” to be xDSL-compatible.<sup>13</sup>

These claims are simply incorrect, and factually inaccurate. In fact, xDSL-compatibility does not represent an “improvement” in the status of any given copper local loop. An xDSL-

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<sup>8</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum and Order, CC Docket No. 98-147, FCC 98-188 (rel. August 7, 1998) (hereinafter “Advanced Services Order”).

<sup>9</sup> Advanced Services Order at ¶53.

<sup>10</sup> *Id.*

<sup>11</sup> In many cases, incumbent LECs simply refuse to negotiate for access to DSL-capable loops. They assert that they are not required by any law or regulation to provide access to a "DSL-capable" loop. Alternatively, ILECs create their own novel definitions of what it means for a loop to be DSL-capable, and then proceed to deny or limit access to competitors based on those grounds, not the competitors' actual needs. For instance, an incumbent LEC may claim that it has no "DSL-capable" loops available in a particular area because the existing loops are too long, incapable of sufficient "speeds" or otherwise "incompatible" with DSL service in some manner. The answer to all of these is the simple requirement that is embodied in the Act: the ILECs must make available copper loops along with information about their physical make-up. The competitors can then decide what technologies to deploy.

<sup>12</sup> *Iowa Board of Utilities v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), cert. granted, 118 S. Ct. 683 (Mem.) (1998).

<sup>13</sup> See, e.g., Ameritech Comments at 11, Bell Atlantic Comments at 47-48, GTE Comments at 96, US West Comments at 45.

compatible loop is simply a plain copper loop, with no load coils and minimal bridged taps, and as such represents the vast majority of the ILECs' existing loop plant. Even if a loop requires removal of bridged taps and load coils to render it xDSL-compatible, that equipment was originally placed by the ILEC to *improve* the quality of the loop, *i.e.*, to make the loop superior. Therefore the loop without the coils and taps cannot be considered superior to the loop with the coils and the taps. The term "superior" implies better than some benchmark, and it is difficult to see how the incumbent LECs can classify a stripped-down, twisted-pair of copper wires as anything but a minimum provision. Only additions above and beyond this could be considered "superior."

Further, traditional "conditioning" of a copper pair—for example to raise a loop from "line" to "trunk" specifications—requires the placement of additional equipment, including electronics, which permanently remain on the loop, and therefore is a recurring cost. By contrast, removing coils and taps is a one-time event, and therefore a non-recurring cost. Once the coils and taps are removed, the monthly recurring charge for the loop should be no higher than for a wire grade loop. Finally, coils are placed on lines in an effort to cure customer complaints about loop quality (thus *adding* the coils—not subtracting them—makes the loop superior), while taps are placed for the ILECs' convenience in providing service. Similarly, from time to time, ILECs remove coils and taps in the normal course of providing services. In neither case is any customer charged anything (except for a possible nominal charge for a service call), as the occasional insertion or removal of coils and taps is built into the costs of the provision of the network, and therefore already included in the costs and prices calculated for service and for unbundled loops.<sup>14</sup>

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<sup>14</sup> CLECs are charged for removal of bridged taps and load coils. The charges range from roughly \$75 to a high, in a recent cost study exercise by SBC, of roughly \$2500.

The Commission must insist that ILECs meet their obligations under Section 251(c)(3) of the 1996 Act to “provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory.”<sup>15</sup> The ILECs cannot claim with any legal or technical accuracy that clean copper loops do not fall under this requirement. Therefore, they must comply with the letter and spirit of the 1996 Act, the Commission’s Local Competition Order,<sup>16</sup> and this NRPM by making these loops readily available to competitors.

**2. Incumbents dubiously claim  
"spectrum interference" concerns  
so as to deny loop access**

Every single incumbent LEC raised the bogeyman of spectrum interference in its initial response to the NPRM, and painted the issue as a dire threat to the integrity of the public switched network.<sup>17</sup> The Commission should not be surprised at this unanimous outcry; it is consistent with the Bell System's historical claims of "harm to the network" to frighten regulators away from competitive solutions. The ILECs simply have the incentive to use “spectrum interference” as yet another scare tactic to prevent new entrants from getting access to clean copper loops need for competition.

Despite their dire warnings, however, none of the incumbents undertook to discuss the technical details of either the harms or the ILECs' proposed spectrum management "policies," for the simple reason that the technical details undercut their position. The various technologies that

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<sup>15</sup> 47 U.S.C. 251(c)(3).

<sup>16</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No., 96-98, FCC 96-325 (rel. Aug. 8, 1996) (“Local Competition Order”) at ¶¶ 377-78.

<sup>17</sup> See Ameritech Comments at 23-24; Bell Atlantic Comments at 49; BellSouth Comments at 51-53; GTE Comments at 83-85; SBC Comments at 32-35; US WEST Comments at 46-47.

the loop plant can support pose different potentials for spectrum interference. Ironically, the loops with the highest power requirements, and consequently the highest likelihood of causing interference, are the incumbents' T-1s employing Alternate Mark Inversion (T-1/AMI) coding. These likely represent the largest majority of the incumbents' T-1 lines. The ILECs' loop plant also includes HDSL technology (including repeaters), the second most common method by which ILECs provision T-1s, and the second most likely to cause spectrum interference. In descending order of likely causation of spectral interference, the loop plant may also have SDSL and IDSL-compatible lines, ADSL-compatible lines employing Discrete Multi-Tone ("DMT") technology, and finally ADSL-compatible lines employing Carrierless Amplitude and Phase modulation ("CAP") technology which are the least likely to cause spectrum interference.

Spectrum management issues for the existing loop plant must be addressed by national standards that are technically sound, competitively neutral, and arrived at through a process that does not favor one set of carriers over another.

The ILECs' approach to this issue to date has varied from a flat refusal to make copper loops available to competitors for their provision of xDSL services (in the case of SBC), to a warning by the ILECs that they are developing spectrum guidelines that they will then impose unilaterally on the CLECs.

More recently, ILECs such as SBC have proposed spectrum masks (or power spectral density masks) which they insist CLECs must meet in their deployment of xDSL services over copper loops. Not surprisingly, these masks exactly match the ILECs' own proposed technology, but either limit or prohibit other technologies, even where other technologies have less potential to cause spectral interference.

Specifically, the DMT masks limit use of the upper end of the available spectrum, in order to meet DMT's requirement of broad skirts or roll-off. Complying with these cut-offs or roll-off skirt shapes would have limited upstream of CAP-based DSL performance, despite the fact that CAP is capable of steeper skirts and, therefore, can use higher frequencies to offer higher speeds without causing interference.

The manufacturers of CAP-based products were forced to reengineer their products to conform to the DMT mask, even though such conformance is not necessary to limit CAP-caused interference (which is unlikely to occur anyway). The unilateral imposition of such artificial costs on competitors is bad for competition, and bad for consumers. It is not sound technically and it is bad public policy.

Nevertheless, in the interest of moving forward, the Commission should order that DSL services compliant with the mask must be permitted by the ILECs, thus essentially ordering the current mask as an interim standard. At the same time, the Commission should take two additional and related steps: (1) prohibit the ILECs from changing the current mask until final standards are adopted, in recognition that the ILECs could "game" the process by making the mask a constantly moving target once the ILECs learn that competitors can comply with the mask; and (2) mandate (or set in place) an industry-based process, with Commission participation, to adopt formal rational standards on spectrum management; the target should be rules with the simplicity of the Part 68 rules in both ease of administration and minimization of technical requirements, limited to those actually necessary to prevent harmful interference.

These steps should go far to forestall the ILECs from using spectral interference scare tactics to prevent competitors from obtaining DSL-capable loops. Further, DATA members agree with the urgings of some commenters that the Commission must adopt a rule explicitly

forbidding an incumbent from using spectrum interference as a reason for refusing to provision, or ceasing to provide, any local loop element.<sup>18</sup> This prohibition must stand at least until enforceable national standards are adopted.<sup>19</sup>

**B. The Interval Between the Order and Delivery of Unencumbered Copper Loops Is Intolerable**

**1. Incumbents falsely raise spectrum unbundling concerns to delay loop access**

Contrary to the ILECs' assertions throughout the Comments,<sup>20</sup> spectrum unbundling is *technically feasible*. It is perfectly feasible today to simultaneously provide both voice and high-speed data transmissions across the same loop. Nearly "all existing DSLAMs and end user modems already permit the provision of . . . voice and data over the same loop."<sup>21</sup>

Even more significant as an indication of the complete absence of technical support for the ILECs' position is that all the ILEC retail DSL tariffs filed with the Commission to date specifically offer ADSL service as an overlay to existing voice service, so that both are provided over the same loop.<sup>22</sup> In each case, as shown for example by the diagram included in the Bell Atlantic tariff filing, the ILECs use splitter functionality to bundle the voice and data at the customer's premises and unbundle them at the CO end.<sup>23</sup> Therefore, far from supporting their argument that there are any technical or policy reasons that voice and data cannot be bundled and

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<sup>18</sup> See, e.g., Covad Comments at 41; Qwest Comments at 61; NorthPoint Comments at 19; KMC Comments at 20-21.

<sup>19</sup> National standards aimed at minimizing spectral interference may well include a mandate to the ILECs to upgrade their loop plant by the planned retirement of T-1/AMI technology, the worst offender.

<sup>20</sup> Ameritech Comments at 21-22; GTE Comments at 86-90; US WEST Comments at 47-48; SBC Comments at 36-42; BellSouth Comments at 51-53.

<sup>21</sup> xDSL Networks Comments at 9.

<sup>22</sup> Indeed, that fact is at the heart of the ILECs' argument that their implementation of DSL service has a \$0 incremental loop cost. Bell Atlantic Direct Case, *Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal No. 1076*, CC Docket No. 98-168 (filed at Oct. 6, 1998) at 13; BellSouth Reply Comments, *BellSouth Telecommunications, Inc. FCC No. 1* (filed Aug. 31, 1998) 10-11; GTE Reply Comments, *GTE Telephone Operating Companies Tariff FCC No. 1* (filed May 28, 1998) at 17-19; Pacific Bell Reply Comments, *Pacific Bell Pacific Tariff FCC No. 128*, (filed June 26, 1998) at 15.

unbundled over a single loop, the ILECs' DSL service offerings demonstrate the ILECs' fully understand that this is easy and routine.

This is not to suggest that the Commission should adopt rules that mandate a particular technological approach to the use of a loop for multiple services. As one commenter aptly stated, “[shared loop access] is a rapidly evolving technology. It is far from clear that these limitations will exist in their current form in even one year from now . . . [a]ny sensible regulation of this evolving technology must be transitional.” MCI WorldCom Comments at 86.

Rather, the Commission must construct regulations which do not allow the incumbent LECs to game the process by locking-out xDSL-based competitors from access to any loop that might also carry a voice channel. The Commission should start with a rule that requires ILECs to unbundle and make available the data and voice channels of a loop but not force a CLEC to purchase both, and let the technological innovation that created xDSL services in the first place continue to alleviate any interference potential.

**2. Incumbents falsely raise  
sub-loop unbundling concerns  
so as to delay loop access**

Several ILECs have addressed this proceeding as an opportunity to attack the notion of “sub-loop unbundling.”<sup>24</sup> Without exception the language of the Local Interconnection Order is dredged up to support the premise that sub-loop unbundling through the digital line carrier (“DLC”) vault or other remote terminal is only marginally feasible, and should only be grudgingly permitted on a case-by-case basis.<sup>25</sup>

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<sup>23</sup> BellAtlantic Telephone Companies Tariff No. 1 Transmittal No.1076 at ¶ 918.39.

<sup>24</sup> See e.g., Ameritech Comments at 17; Bell Atlantic Comments at 52; GTE Comments at 98; US WEST Comments at 48-49; SBC Comments at 45-46; BellSouth Comments at 49-50.

<sup>25</sup> Local Competition Order at ¶¶ 383, 391.



The ILECs ignore the technological developments that have occurred in the more than two years since that Order. Most importantly, the technical feasibility of sub-loop unbundling has been settled, because state commissions have ordered it, and some ILECs have indicated a willingness to provide it.

In addition, the Commission has come to understand through a variety of proceedings that DLC technologies in ILEC loop plant limits the deployment of DSL services—at least limits the competitive deployment of DSL services—and that sub-loop unbundling is one of several methods of permitting competitive deployment of DSL services to customers served by a loop provisioned in part by DLC.

**C. The Commission Must Remain Vigilant  
in Ensuring That ILECs Do Not Engage  
in Anticompetitive Pricing**

Anticompetitive pricing activity can occur whether or not an ILEC chooses the affiliate option, albeit the risks are substantially lower under the affiliate approach. The Commission has already recognized the potential for an anticompetitive "price squeeze" in its investigation of several incumbents' xDSL tariffs.<sup>26</sup> The comparative pricing of xDSL retail service and xDSL inputs<sup>27</sup> (specifically UNEs and collocation) can be a significant tool in the arsenal of the ILECs as they attempt to limit the ability of new entrants to offer competitive services. "Competitive providers of DSL solutions cannot compete at a price level with the ILECs' retail DSL services

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<sup>26</sup> *Bell Atlantic Telephone Companies Tariff No. 1 Transmittal No. 1076* Order suspending Tariff and Designating for investigation Docket No. 98-168 (rel. September 15, 1998). *BellSouth Telecommunications, Inc. BellSouth Tariff FCC No. 1, BellSouth Transmittal No. 476*, Order Suspending Tariff and Designating Issues for Investigation, CC Docket No. 98-161 (rel. Sept 1, 1998); *GTE Telephone Operations GTOC Tariff No. 1 GTOC Transmittal No. 1148*, Order, CC Docket 98-79 (rel. May 29, 1998); *Pacific Bell Telephone Company Pacific Bell FCC No. 128 Pacific Transmittal No. 1986*, Order, CC Docket No. 98-103 (rel. July 29, 1998).

<sup>27</sup> Contrary to Bell Atlantic's claims, DSL service is not an input unto itself. There are inputs needed to provide DSL services and those inputs include loops, collocation, transport and cross-connects. Bell Atlantic at 54.

that do not include the same input costs that competitors must pay to provide similar services.”<sup>28</sup> Moreover, as the Commission has already alluded to in its NPRM inquiries, an ILEC acting in concert with its own affiliate can also similarly effect a price squeeze.<sup>29</sup> For instance, the ILEC could charge its affiliate high-price with the understanding that a resulting artificially poor bottom-line in the affiliate would be balance by the increased revenues of the parent. Or an ILEC, through creative accounting or cost-shifting, could charge its affiliate a lower price than paid by competitive LECs.

Thus, the Commission cannot just assume that the affiliate structure will protect competitors. Rather, the Commission must craft within the affiliate option safeguards and incentives that will protect against anticompetitive pricing. Specifically, the Commission must take a very clear stance that price matters, and that if the incumbents want approval of their federal xDSL tariffs or if they want the statutory freedom of the affiliate option, ILECs must charge CLECs the same input prices assumed in ILEC retail xDSL prices or charged by the ILEC to its advanced services affiliate.

In their comments the incumbents have tried to create the false impression that the pricing of DSL inputs does not matter. In fact, with the exception of a few summary conclusions on the Commission’s authority to discuss pricing issues or pat responses that market forces will address pricing concerns, the ILECs have virtually ignored one of the most significant concerns of those attempting to access the local loop and other key bottleneck facilities.<sup>30</sup> BellSouth has asked the Commission to “freely grant forbearance from dominant carrier pricing and tariffing

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<sup>28</sup> Comments of ACI Corp. and First World Communications, Inc. on the Direct Cases of BellSouth, GTE and Pacific Bell at 12.

<sup>29</sup> Advanced Services Order at ¶ 102.

<sup>30</sup> The incumbent LECs have also tried to give the impression that price does not matter in a related proceeding. Comments of ACI Corp. and FirstWorld Communications, Inc. on the Direct Cases of BellSouth, GTE and Pacific Bell, CC Docket Nos. 98-161, 98-79, 98-103 at 8-20.

regulations” arguing that market forces will solve pricing concerns.<sup>31</sup> Ameritech goes so far as to state that the “price of collocation arrangements cannot be an issue here,” and that the Commission’s concern about reducing competing carriers’ collocation costs should also be tempered by the successful implementation of collocation arrangements in certain areas.”<sup>32</sup>

These arguments might be credible if the market for inputs—including loop and collocation—were effectively competitive. These arguments are patently wrong in the real world where the market for inputs is a monopoly (or set of non-overlapping monopolies). Thus, price matters. Ameritech and other incumbents ignore that their competitors’ ability to access inputs, such as loops and collocation, is inextricably tied to price. Price determines the affordability of entrance and continued market participation, and thus determines the pace and extent of competition. This is particularly true where the ILECs pocket the money paid by their competitors for inputs. In the real world, all input prices above economic cost are simply taxes imposed by incumbents on competition.

Accordingly, if the Commission wants to ensure that competitive carriers have access to the local loops and other bottleneck facilities needed to provide DSL services, the Eighth Circuit decision notwithstanding, the Commission cannot shy away from addressing pricing. The ILECs have tried to shroud any federal regulatory action that could remotely impact price with an aura of absolute untouchability. For instance SBC has objected to the Commission’s inquiry on various pricing methods and structures for collocation arrangements, arguing that the Commission has “no authority to dictate pricing structures.”<sup>33</sup> The Eighth Circuit decision does not mean that the Commission must ignore anticompetitive price squeezes that arise between interstate retail service prices, such as xDSL-based advanced services, and intrastate UNE prices.

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<sup>31</sup> BellSouth Comments at 31.

<sup>32</sup> Ameritech Comments at 37.

The Commission can lessen incumbents' incentive and opportunity to engage in anticompetitive pricing without running afoul of the Eighth Circuit. Specifically, the Commission does not have to accept—indeed, cannot accept—incumbents' DSL tariffs that impose a price squeeze.<sup>34</sup> The Commission does not have to create a loosely-structured affiliate option that would allow the ILECs to cross-subsidize the cost of DSL inputs. The Commission does not have to allow the ILECs to provide affiliates with inputs without documenting in detail those transactions and their prices. Moreover, the Commission does not have to allow ILEC affiliates to engage in fanciful accounting, in order to underprice competitors. Rather, should an ILEC engage in these and other similar behaviors, the Commission can simply reject or suspend an ILECs' xDSL tariff or determine that the ILEC affiliate is no longer standing in the shoes of a CLEC, but is in fact an ILEC, and should therefore be subject to all of the regulatory strictures of an ILEC.

## **II. ILECS CONTINUE TO DENY CLECS CRITICAL ACCESS TO BOTH ENDS OF THE LOOP**

Competition for DSL-based services requires that all carriers—not just the ILECs—have access to both ends of the loop, wherever that may be, in order to place equipment. One end of the loop is under the customer's control, and CLECs are responsible for gaining access to the customer end of the loop to place DSL "modems."<sup>35</sup> The other end of the loop is under the incumbent LEC's control, and the CLECs must rely on the incumbent LECs for access to that "other" end. That "other" end may be found at an ILEC wire center or central office, in a remote switch, in a remote terminal, or in a vault (*e.g.*, in the case of DLC). This in turn generates the

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<sup>33</sup> SBC Comments at 28.

<sup>34</sup> The xDSL services of ILECs not utilizing the affiliate option will be dominant services, and thus subject to the federal tariffing authority of the Commission.

requirement that CLECs collocate DSL termination equipment most commonly at (or adjacent to) the ILEC's central office, or and at (or adjacent to) the ILEC's DLC remote terminal. In both cases, just as with loops, the Commission can answer each of its questions regarding the necessity of national collocation rules,<sup>35</sup> by asking what the effect would be on the three key criteria of *availability*, *provisioning interval*, and *price*. In every instance where the Commission finds that the ILECs are employing their control over the network's "essential facilities" to deny competitors access to necessary collocation—be it by denying or delaying availability, lengthening the provisioning interval, or by increasing price—the Commission must identify the anticompetitive behavior, and consider what specific pro-competitive rules would deny incumbents either the incentive or the ability to continue their practices.

**A. DSL Loop Termination at or Near the Central Office**

As has been demonstrated by numerous parties throughout these proceedings, xDSL services cannot be delivered by a competitor without access to both ends of the local loop. Most often, this means that CLECs require some form of physical collocation at a location controlled by the incumbent, such as a central office. The incumbent LECs have successfully denied access to their competitors on availability, interval *and* price.

The ILECs, not surprisingly, seek to convince the Commission that the existing collocation rules work well, and that no additional steps are necessary at this time. Ameritech boldly states that "National Standards Are Not Needed or Appropriate," Ameritech Comments at 32, and that "collocation measures should be determined through negotiation and

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<sup>35</sup> The ATU's that transform a plain copper loop into a DSL loop are digital in both input and output; since neither "modulation" nor "demodulation" occurs, the devices are by definition not modems. These devices are sometimes called "DSL" modems for simplicity's sake.

<sup>36</sup> NPRM at ¶¶ 118-150.

arbitration—not federal regulation."<sup>37</sup> US West claims that national collocation standards would be an effort by the Commission to "fix a process that is not broken."<sup>38</sup> Given the unbalanced negotiating leverage of the incumbents, this comes as no surprise. The reality is, however, that in the face of incumbent stonewalling, individual company-to-company negotiations for collocation provide little relief for new entrants, and even that only after lengthy delays and expensive processes, such as arbitration proceedings and antitrust complaints. National collocation rules are essential to eliminate the status quo quagmire, which favors incumbents over new entrants, and thus denies or delays consumers the benefits of a competitive market.

The Commission must act quickly and explicitly to address each of the methods by which the incumbents work to deny access to collocation: denial of availability of physical collocation space, establishing unreasonable intervals for collocation preparation and build-out, and charging unreasonable prices. In addition to collocation-specific rules, the Commission should mandate that ILECs offer advanced services only through separate affiliates subject to all the same rules and treatment as all other CLECs (*see infra* Section III).

#### **1. Central Office collocation is artificially limited**

There are no consistent standards or practices to define "availability," to determine "availability," to verify the ILECs' claims that space is not available, or to provide incentives or mandates for ILECs to make space available when and as needed by competitors.

For example, DATA is unaware of any state that has undertaken a rigorous approach to defining "available." ILECs routinely require that collocators all be housed in an enclosed room constructed for that purpose. This lengthens the provisioning interval and dramatically increases the cost of collocation in a central office where such a room has not already been constructed.

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<sup>37</sup> *Id.* at 33; US West Comments at 36; SBC Comments at 20-29.

<sup>38</sup> US West Comments at 36.

The effect on "availability" is even more dramatic. When a competitor requests physical collocation the ILEC looks in that room to see if space is available; the ILEC reports that there is no available space if no space is available in that room, even if that room is in an otherwise sparsely populated floor. Typically, there may be space in that room for equipment, but not for a 10' x 10' enclosure, generating a "no space" response from the ILEC.<sup>39</sup>

Similarly, while the Act requires an ILEC denying collocation for lack of space to demonstrate the lack of space to the state commission, only a few states actually require this demonstration and even fewer ILECs volunteer it. And while some few states have begun to focus on procedures to audit claims of "no space," such procedures are by no means common.

The incumbent LECs argue that additional rules are not required to ensure that all available central office space is open to competitive use. Rather, the ILECs claim that the individual negotiation process is the most appropriate means for resolving collocation availability issues. "These carrier-specific agreements reflect the give and take that is inherent to contracts and antithetical to the one-sided regulatory fiat structure that Congress rejected but that the Commission again seeks to impose."<sup>40</sup> This is like saying that there is no need for "truth in advertising" laws, because consumers are most likely to achieve fair results through face-to-face negotiations with their local used-car salesman. In fact, the CLEC collocation situation is even worse: it is like living in a town where there are no "lemon laws" and only one used-car lot for over 100 miles. Not only does the car dealer/incumbent LEC have zero incentive to negotiate in good faith, but the consumer has no other competitive alternative, and therefore little economic leverage.

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<sup>39</sup> Cageless collocation is a partial answer, but leaves unanswered questions of provisioning intervals and pricing. An analysis of collocation tariffs of one ILEC that has denied physical collocation requests indicates, for example, that virtual collocation on the same scale as would fit in a 10' x 10' cage costs more than physical collocation and takes at least as long to provision.

ILEC claims that they are "are already obliged to demonstrate no space" to state commissions<sup>41</sup> is, to put it gently, an over-statement. Because there is no national standard or definition for the claim "no available space," incumbents are free to unilaterally interpret that phrase as they wish. Moreover, there are currently no restrictions on how an ILEC can use space in the central office. As a result, an ILEC may deny collocation space to a CLEC based on "no available space," while simultaneously storing antiquated equipment or using valuable central office space to house administrative functions which can be located elsewhere. CLECs are relegated to lengthy and expensive processes at the state commissions to address these concerns.

The Commission should adopt its tentative conclusion that where an incumbent LEC has denied a request for physical collocation based on space limitations it must not only provide the state commission with detailed floor plans, but "should also allow any competing provider that is seeking physical collocation at the LEC's premises to tour the premises." NPRM at ¶ 146. The Commission should further find that in those central offices where physical collocation has been denied to competitors on space availability grounds, the use of central office building space by the incumbent for any non-central-office-essential function is presumptively suspect.

Nor should the incumbents be allowed to escape from their collocation obligations simply by offering virtual collocation. For several reasons, virtual collocation is clearly not an acceptable alternative to physical collocation for xDSL providers. First, many xDSL providers guarantee minimum service requirements to their customers. As a result, the xDSL CLEC requires either direct access to its collocated equipment for around-the-clock service and maintenance, or a contract-based guarantee from the ILEC that it will meet the service requirements demanded by the CLEC's customers. Because virtual collocation does not allow

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<sup>40</sup> Ameritech Comments at 35.

<sup>41</sup> See, e.g., Bell Atlantic Comments at 41-42.



CLECs access to their equipment, and the ILECs uniformly refuse to commit to, much less guarantee, their service and maintenance intervals at any price, virtual collocation is simply inadequate. Second, virtual collocation can take just as long to provision, and cost more than physical collocation. Finally, with the pace of today's new equipment development. Thus, virtual collocation is simply not a realistic or meaningful substitute for physical collocation for competitors seeking to provide and guarantee high levels of service quality to their customers.

The ILECs further deny access to the central office by means of inconsistent equipment safety requirements. The standards not only vary across the nation, from incumbent to incumbent, but ILECs regularly hold competitors to higher safety standards than they require of themselves. The Commission should require that any central office equipment safety standards must apply uniformly to the incumbent LEC as well as to competitors. Further, incumbent LECs should not be left in the position of unilaterally and individually setting safety requirements for their competitors because such a rule simply provides the incumbents with an additional method of denying access to their essential facilities. And safety standards should be limited to just that: the minimum standards necessary to ensure safety, without the burden of standards on issues such as reliability that are unrelated to safety.<sup>42</sup>

ILECs also deny availability by refusing alternative collocation options. In an effort to be flexible and seek creative solutions, CLECs have offered a variety of collocation alternatives to the incumbents, including shared, cageless and adjacent collocation. These alternatives represent cost-effective methods for competitors to gain access to the bare minimum central office space needed in order to provide service. With rare exception, the incumbent LECs have

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<sup>42</sup> Part 68 rules, for example, ensure network safety but properly do not provide consumers with guarantees of utility, feature sets, etc. Similarly, the Underwriter's Laboratory standards on electrical appliances guarantee that your toaster is safe, but not that it will do a good job. Utility, reliability, and features are best left to the market.

either flatly refused to implement the alternative,<sup>43</sup> or have agreed to consider the alternatives only in the context of a Bona Fide Request ("BFR")—the "black hole" of the competitive world—or have only recently begun to consider such alternatives, but have not yet offered them.<sup>44</sup>

The Commission should reiterate that incumbent LECs are obligated to provide any technically feasible collocation requested by competitors, and specifically find that the shared, cageless and adjacent collocation alternatives are technically feasible. As demonstrated at the Commission's technical conference on collocation issues,<sup>45</sup> the security and technology concerns raised by the incumbents<sup>46</sup> in opposition to alternative collocation approaches are readily addressable and should not be allowed to be used as further barriers to market entry.

Only through tough national rules—for instance by requiring tours of COs where ILECs claim "no availability," by requiring ILECs to treat their advanced services affiliates "equally" to other competitors for collocation, and by requiring ILECs to allow alternative forms of collocation—can the Commission provide new entrants with the leverage necessary for the interconnection agreement process to work.

## **2. The ILECs deny competition based on Central Office collocation intervals**

Even where collocation space is eventually found to be "available" and a reasonable price is charged, competitors can expect to face long delays before access is actually granted. The intervals for collocation preparation and build-out are outrageous. ILECs take 30-90 days to simply reply to a request for collocation, only to inform the requesting party that preparation and

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<sup>43</sup> See, e.g., GTE Comments at 68-70; SBC Comments at 22 (refusing to implement cageless collocation).

<sup>44</sup> One exception has been Pacific Bell, which has been relatively creative in this area. It is not clear, however, whether this creativity will survive under the SBC regime.

<sup>45</sup> *FCC's Roundtable Discussion on the Collocation of Equipment* (October 13, 1998) ("FCC's Collocation Roundtable").

build-out will take an additional 90 to 180 days. Moreover, incumbents often fail to meet even their own intervals. On top of these delays, CLECs are not allowed to order critical DS-3 lines until build-out is complete. Currently the interval for DS-3 provisioning is frequently an additional 60-90 days, despite the fact that DS-3's are regularly provisioned by IXC's in two days or less. Worse still, ILECs usually will not accept DS-3 orders until after they complete cage construction, so those two intervals are stacked rather than running in parallel. And, as a final insult, while CLECs routinely state their DS-3 requirements when they first request collocation, 150 or 180 or 270 days later when the cage is finally finished and the ILEC permits the CLEC to actually order the DS-3s, the ILECs frequently claim that "unanticipated demand" has depleted their DS-3 capacity, and that it will take another 30-90 days to make DS-3s available.

ILECs respond to complaints about collocation intervals by claiming that their staff is working around-the-clock to address the needs of numerous CLECs.<sup>46</sup> What the ILECs fail to report, however, is that they have deliberately under-staffed their collocation request and collocation construction functions. For instance, Bell Atlantic has assigned only two people to handle all the collocation requests for all its central offices. And Bell Atlantic has *only one* person handling all collocation construction issues throughout its entire 12-state region (from Maine to Virginia). Similarly, one ILEC explained its requirement of up to 90 days to respond to a collocation request by explaining that multiple orders from multiple CLECs mean that the "couple" of people responsible for responding may take up to 60 days or more to begin considering some requests.

This purposeful under-staffing of functions on which competitors rely is a particularly clever gambit. It allows the ILECs to systematically slow-roll their competitors while

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<sup>46</sup> Bell Atlantic Comments at 33-34.

<sup>47</sup> FCC's Collocation Roundtable.

simultaneously allowing the ILECs to truthfully claim to the state commissions that their people are working as hard as possible.<sup>48</sup>

This gambit is also particularly instructive of the ILECs' monopolistic mindset. When a competitive company sees a strong demand for its goods or services, it sees good news, and accordingly staffs up and builds infrastructure to meet the demand. When an ILEC sees strong demand from the CLECs, it sees bad news, and accordingly it staffs down to delay meeting that demand, and charges its customers confiscatory prices to build the infrastructure it will then use to sell services to those customers. By delaying collocation, the incumbent LECs impede the CLECs' ability to compete, while the ILECs' own advanced services units have immediate access to each and every central office.

National rules are needed to provide CLECs the same access to the central office as the ILECs provide themselves. This can be achieved through a combination of specific rules limiting the maximum collocation interval, imposing meaningful penalties for breaches of provisioning intervals, and implementing the Commission's proposed separate affiliate rules. At a minimum, the Commission must consider the nature of the task being requested—preparation of space for the placement of equipment—and require incumbent LECs to respond in a reasonable fashion.

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<sup>48</sup> It would be enlightening for the Commission to audit the number of people involved in the ILECs' recent, rapid, and widespread rollout of their own retail DSL services compared to the number of people involved in meeting DSL competitors' needs.

**3. The ILECs impede collocation at the Central Office by requiring cumbersome build-out and overpricing each part**

The incumbents' abuse of collocation pricing is equally troublesome. Where the incumbents have been unable to deny new entrants collocation based on availability, preparation and build-out pricing for physical collocation has been an highly effective tool in preventing competition. Rhythms Comments at 28-30; NorthPoint Comments at 11-15; Covad Comments at 8-10. Once again, the existing "balance of power" is tipped strongly in favor of the incumbents, which is why they are advocating so strongly to maintain the status quo.<sup>49</sup>

DATA members face collocation preparation and build-out costs that can increase collocation costs up to five times. Rhythms has been told by Bell Atlantic that it can expect to pay "special" collocation preparation costs in *every* central office throughout Bell Atlantic's Southern Region, from New Jersey through Virginia. The prices provided to date range up to \$275, 000 for a single central office. Worse, the incumbent LECs expect competitors to pay these fees without any kind of detailed break-down of what the money buys (although that term is inaccurate, since the CLEC pays but the ILEC owns and rents back to the CLEC).

National rules that take into consideration the actual costs necessary to build-out collocation space, and apportion these costs up front over the number of collocators that can be accommodated, are necessary to ensure robust competition in the xDSL marketplace. The monopolists' exorbitant and gouging prices are just as damaging to a new entrant's ability to build out its network as is a flat denial of collocation space.

In addressing collocation costs, the Commission can provide immediate relief by imposing reasonable caps on the amount incumbents can charge competitors for collocation build-out. While these caps may be initially tied to the most reasonable costs charged by

incumbents around the nation, a further reasonableness check is required. The Commission must recognize that collocation preparation and build-out costs are being used anticompetitively, and only by reasonably determining what the actual costs of providing those services in a competitive environment would be can the Commission remove this imposing barrier to entry.

#### **B. xDSL Service on a DLC Loop**

More and more, the ILECs are moving to a network architecture that employs digital loop carrier ("DLC") to transport relatively large volumes of loop traffic from strategically placed remote terminals to the central office. Because this process often involves the conversion of copper line traffic to some form of digital carrier, including fiber, this architecture conflicts with the provision of xDSL services that require continual use of copper lines.

xDSL-based CLECs have proposed a number of technical alternatives directed at resolving this conflict for competitors in a manner that is technically feasible and economically efficient.<sup>49</sup> However, because the DLC remote terminal is an effective method for denying CLECs access to the essential facilities necessary to provide xDSL-based services, the incumbent LECs have either resisted these proposals, asked the Commission to refrain from making any of them mandatory, or ignored them altogether. The Commission must recognize that the ILECs' refusal to give competitors access to the DLC remote terminal is just another example of the incumbents' anticompetitive pattern, and that in fact there are numerous technically feasible solutions to the competitive provision of xDSL services over loops served by DLC.

Without even addressing the technical merits of the CLECs' technical alternatives, the ILECs' attempt to generally dismiss them, on the legal argument that they generally consist of

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<sup>49</sup> SBC Comments at 28; GTE Comments at 75-76; Bell Atlantic Comments at 44-45.

<sup>50</sup> Rhythms Comments at 9-13.

"sub-loop unbundling" which is not required under the Act.<sup>51</sup> The CLEC remote terminal alternatives, however, are not manifestations of sub-loop unbundling. Rather, they simply reflect the business reality that the CLECs need to collocate equipment at both ends of a full loop. Thus, where the copper is terminated at or near the remote terminal, *that is the end of the loop*, and collocation is appropriate. Where the CLECs request rearrangement of the xDSL customer onto an existing copper loop that is obviously neither sub-loop unbundling nor collocation, but simply the CLEC requesting a complete unbundled copper loop from the customer premises to the central office. Similarly the collocation of DSL equipment or line cards in the DLC terminal is clearly not sub-loop unbundling. The Commission should not allow the ILECs to deny xDSL-capable loops because the incumbents refuse to deploy technically feasible solutions.

In particular, DATA has proposed the following as alternative means for making DLC remote terminals compatible with xDSL-equipped copper loops:<sup>52</sup>

1. Rearrangement of the xDSL customer onto copper. Rhythms Comments at 11.
2. Collocation at the DLC vault. *Id.* at 8
3. Line card collocation or DLC Vault Unbundling. *Id.* at 10.

In addition, CLECs can solve for the DLC remote terminal/DSL compatibility problem by collocating at a CLEC-built vault located in closed proximity and cross-connected to the DLC vault, otherwise known as adjacent vault collocation.

By finding that these and other solutions to the DLC remote terminal conflict are technically feasible and mandating that they be permitted, the Commission can take an important step toward removing barriers to competition raised by the incumbents. As with loops and collocation at the central office, the incumbents have raised unwarranted concerns in an attempt

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<sup>51</sup> Ameritech Comments at 17-21, Bell Atlantic Comments at 52; GTE Comments at 98-99.

<sup>52</sup> Rhythms Comments at 8-12.

to deny access to essential network facilities, namely loops served in part by DLC. As demonstrated by the discussion in our Comments of available technical alternatives, the incumbents' concerns can be readily addressed, and would have been addressed long ago, had the incumbents been acting under the pressures of true competition.

### **III. THE COMMISSION SHOULD MAKE SEPARATE SUBSIDIARIES MANDATORY FOR ILEC PROVISION OF ADVANCED SERVICES**

The Commission's separate affiliate proposal<sup>53</sup> is a necessary and proper solution for ensuring that competitive LECs obtain nondiscriminatory access to the loops and collocation facilities necessary for provision of advanced services in a reasonable, timely and efficient fashion. After lengthy consideration of the separate affiliate proposal both in this proceeding and in the Notice of Inquiry proceeding, DATA members conclude that this proposal should in fact be a mandatory and unconditional prerequisite for any incumbent seeking to offer advanced services in the retail market. This proposal is entirely consistent with the pro-competitive provisions of the 1996 Act as well as the Commission's commitment to fostering competition in advanced telecommunications services. The Commission can achieve this goal only through adoption of separations rules that most effectively guard against anticompetitive behavior between ILECs and their affiliates, and by enforcing those rules strictly. Separate affiliates that remain truly separate in both structure and operation will both ensure nondiscriminatory treatment for all CLECs while contributing meaningfully to competition in the advanced services market. Finally, if despite the separate affiliate rules the ILEC's affiliate obtains collocation or access to loops, when unaffiliated CLECs have been denied, the Commission should treat that as a presumptive violation of the separation rules, and mandate that the separate affiliate provide unbundling and resale of its DSL services at those office or too those loops.



**A. Incumbent ILECs Should Be Required to Offer Advanced Services Through a Separate Affiliate**

DATA members urge the Commission to mandate separate affiliates for ILEC provision of advanced services. Some ILECs have vehemently opposed the separate affiliate proposal, arguing that it would make it virtually impossible for them to provide advanced services. Their claim that they would not offer services at all if they had to be treated like any other CLEC is a telling commentary on their treatment of CLECs. That claim is eviscerated by the fact that several ILECs have accepted the affiliate proposal, including some like Ameritech and GTE that had already made independent business decisions to provide advanced services through separate subsidiaries.<sup>54</sup>

The separate affiliate proposal is a powerful tool for minimizing ILEC control of the wholesale inputs market as they enter the advanced services retail market.<sup>55</sup> A properly applied and enforced separate affiliate rule forces an incumbent's transactions with its advanced services subsidiary into the light of day, and requires that the affiliate be treated no better than the ILEC treats other competitors. The effect of this rule is likely to be that the ILEC is forced to provide competitors reasonable access to its essential facilities because otherwise its affiliate would suffer from the same high costs, long delays and unavailable network elements experienced by today's CLEC.

Therefore, the Commission should conclude that ILECs must, as a prerequisite to providing advanced services, create a wholly separate subsidiary—a CLEC—that is structurally

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<sup>53</sup> NPRM ¶¶ 92-115.

<sup>54</sup> For example, Ameritech and NorthPoint submitted a Joint Statement of Principles Applicable in a Separate Subsidiary Environment. Ameritech Comments Attachment 2. Further, GTE proposed the National Advanced Service Plan (NASP) in its NPRM Comments at pages iii - v. Finally, SBC "is not unalterably opposed" to the proposal, SBC Comments at 5, and proposes alternative separations rules in its comments, *id.* at 6- 12.

<sup>55</sup> DATA provides a thorough analysis of ILEC market power in advanced services inputs in its NOI Reply Comments (filed October 8, 1998) at 4-18.

and operationally independent from the ILEC, and that interacts with the ILEC on the same basis as any other CLEC.

**B. The Commission Must Ensure That  
Its Final Separation Rules Achieve Truly  
Separate Affiliates and Are Strictly Enforced**

The Commission's proposed separation requirements reflect well-reasoned judgments about the potential for ILEC anticompetitive behavior, and will promote the deployment and development of advanced services in furtherance of Section 706. The Commission should adopt these requirements and mechanisms for monitoring compliance to ensure that the affiliate is not only structurally separate, but functionally separate as well.

The affiliate option is a viable, reasonable solution. For example, Ameritech has found that its best interests lie in forming separate data subsidiaries.<sup>56</sup> In addition, GTE has drafted its own separate affiliate solution. Both Ameritech and GTE have agreed to establish separate subsidiaries

Separate affiliates must be truly separate in both structure and operation in order to minimize the ILECs' incentive and opportunity to use their affiliates in an anticompetitive fashion. Important components of separation include, as the FCC has already recognized, the manner in which affiliates obtain loops and collocation, the terms under which affiliates obtain credit, a prohibition on the transfer of assets and equipment from the ILEC to the affiliate and a general mandate that the ILEC deal at arm's length with the affiliate in the same manner in which it now deals with CLECs. Any ILEC attempt to whittle away certain or all of these separations criteria are immediately suspect and would result in the failure of the separation process entirely. Thus, the Commission should ensure that its standards and rules on structural

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<sup>56</sup> Joint Statement of Principles Applicable in a Separate Subsidiary Environment by Ameritech and NorthPoint, Ameritech Comments Attachment 2.

separation apply equally to the ILECs who have already opted for separation, such as Ameritech and GTE, as well as for those for whom it is mandated.

Finally the Commission must insist on the full panoply of rules it set forth in the NPRM. As the Commission recognized the separate affiliate approach is effective only when it is truly separate. And the full panoply of the Commission's rules are necessary to create true separation.

**C. The Separate Affiliate Proposal  
Is Within the Commission's Discretion  
and Is Not Inconsistent with the 1996 Act  
or Commission Precedent**

Several ILEC commenters argue that the Commission's separate affiliate proposal is either not warranted by, or is inconsistent with, the 1996 Act.<sup>57</sup> ILEC commenters further maintain that the Commission's proposal is a departure from its own precedent.<sup>58</sup> These arguments fail, however, under the plain language of Section 706, and its local competition counterparts, as well as the Commission's interpretation of the 1996 Act in the *Non-Accounting Safeguards Order*.<sup>59</sup> Separation requirements as proposed by the FCC are in keeping with Congress's goal of competition in advanced services and the Commission's traditional pro-competitive policies.

**1. Section 706 grants the Commission authority  
to mandate separate affiliates**

ILEC commenters maintain that the separation proposal finds no support in the 1996 Act. Section 706, however, expressly grants the Commission the authority to employ any regulatory means necessary to foster local competition in advanced services. *See* 47 U.S.C. § 706(a). This

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<sup>57</sup> Ameritech Comments at 49-54; GTE Comments at 29-34; US West at 24.

<sup>58</sup> US West Comments at 25-27; GTE Comments at 34-37.

<sup>59</sup> *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, FCC 96-489, 11 FCC Rcd. 21,905 (1996) ("Non-Accounting Safeguards").

provision defeats any argument that the Commission is acting outside its authority in proposing separate affiliate requirements.

Incumbent LECs also argue that the Commission's proposal is flawed because it is modeled on the separations requirements in Section 272.<sup>60</sup> This argument is mired in trivial distinctions and ignores the common aim of Sections 272 and 706: to promote competition in advanced services. Section 272 merely provides a model for achieving Section 706's goals through minimizing ILEC market power by requiring them to deal with affiliates at arm's length and in a manner equal to their dealings with non-affiliated CLECs. In basing its separate affiliate proposal on the framework of Section 272, the Commission has not declared that the advanced services market is identical to the interLATA services market; nowhere in the NPRM does the Commission make such a statement or refer to Section 272 in more than a passing manner.<sup>61</sup> Moreover, the fact that Section 272 specifically addresses the interLATA telecommunications and information services market, which US West assiduously points out,<sup>62</sup> does not make its separation criteria wholly inapposite to the opening of advanced services markets. Rather, Section 272 provides useful guidelines that are instructive for determining what constitutes separate status and how concretely to achieve it. The Commission's proposal should therefore not be discounted solely because it relies loosely upon Section 272.

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<sup>60</sup> US West Comments at 28; SBC Comments at 11.

<sup>61</sup> See NPRM ¶¶ 92-115. The FCC cites Section 272 to support one of its criteria at ¶ 96 n.191.

<sup>62</sup> US West Comments at 28.

**2. Structural separation is consistent  
with Commission precedent  
in dealing with incumbent market power**

The Commission's advanced services separate affiliate proposal is entirely consistent with the Commission's past practice in controlling ILEC market dominance and control of essential facilities. Most recently, in the *Non-Accounting Safeguards Order* the Commission adopted ILEC affiliate separations requirements "to govern entry by the Bell Operating Companies (BOCs) into certain new markets."<sup>63</sup> These requirements were intended to further Congress's mandate to preserve the potential for new competitive markets by "prohibit[ing] anticompetitive discrimination and cost-shifting, while still giving consumers the benefit of competition."<sup>64</sup> It is difficult to ascertain, having read this order, why the Commission's separate affiliate proposal for advanced services, admittedly a "new market," is inconsistent with the precedent in *Non-Accounting Safeguards*. Some ILEC commenters, however, insist that the separate affiliate proposal marks a stark break with this precedent.<sup>65</sup>

GTE provides one facile distinction between the two proceedings by asserting that the *Non-Accounting Safeguards Order* makes no mention of the advanced services market when addressing ILEC separate affiliates.<sup>66</sup> Specifically, GTE argues that the Commission's prohibition of transfer of "bottleneck" equipment in *Non-Accounting Safeguards* does not include *advanced services* equipment and thus is inapplicable to this market. *Id.* This argument ignores Congress's mandate that the Commission promote advanced services "without regard to any transmission media or technology"<sup>67</sup> and is particularly ironic, given that GTE was among the most vehement commenters in insisting that the Commission remain technologically-neutral

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<sup>63</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd. at 21,908.

<sup>64</sup> *Id.* at 21,911.

<sup>65</sup> GTE Comments at 31; US West Comments at 31-32.

<sup>66</sup> GTE Comments at 31.

when regulating advanced services.<sup>67</sup> Further, the provision of advanced services requires precisely the same “bottleneck” facilities that *Non-Accounting Safeguards* seeks to make available:<sup>68</sup> factory-issue copper loops and collocation space. Therefore, to require a similar degree of separation between ILECs and their affiliates under Section 706 as under Section 272 and its attendant FCC orders in no way represents a break from regulatory precedent regarding ILEC entry into new retail markets.

### CONCLUSION

The technology and the entrepreneurs exist today to provide services that could scarcely have been imagined just a short while ago. But the competitive provision of those services requires that all potential providers have access to these bottleneck facilities. All participants in these proceedings, including not least the Commission itself, prefer a competitive environment free from burdensome and necessarily imprecise regulation. If there were a competitive market for ubiquitous access to customers through loops or loop substitutes, so that all providers could obtain them with equal ease and on equal terms and conditions, there would be little or no need for regulation.

Unfortunately for all parties—and most unfortunately for consumers—there are no ubiquitous loop substitutes available now or in the near future, and the loop plant (as well as the locations at which the loop plant can be accessed) remain under the tight monopoly control of the incumbent LECs. Like all vertically integrated monopolists faced with competition in a market requiring as inputs elements over which they enjoy monopoly control, the incumbent LECs have the incentive and ability to use their monopoly control of the inputs to impede competitive entry in services dependent on those inputs.

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<sup>67</sup> 1996 Act § 706(c)(1).

<sup>68</sup> GTE Comments at 31.

Under these circumstances, the public interest is clearly best served by Commission actions that will hasten the arrival of competition, so that consumers get the competitive benefits of more innovation, increased variety, higher quality of service, and lower prices. In the market for advanced services—which for now means the market for advanced services over DSL lines—this means that the Commission must set explicit nationwide rules that prevent ILECs from denying access to loops and collocation on the basis of availability, price or interval.

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<sup>69</sup> *Non-Accounting Safeguards*, 11 FCC Rcd. at 21,911.

In addition, the Commission must adopt its proposed separate affiliate rule mandating that ILECs provide advanced services through an affiliate that functions like any other CLEC, structurally and functionally separated from the ILEC subject to the full set of rules proposed in the NPRM. The clear steps proposed by the Commission in its NPRM provide the best opportunity for meeting the Section 706 goals of promoting advanced services for all Americans.

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